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Client Alert

International Arbitration Practice Group

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International Litigation Update: Developments Concerning the Alien Tort Statute and Personal Jurisdiction

In the span of less than a week, the U.S. Supreme Court issued its decision in *Kiobel v. Royal Dutch Petroleum Co.*,[i] a decision concerning the reach of the Alien Tort Statute, and granted *certiorari* in *Bauman v. DaimlerChrysler Corp.*,[ii] a case in which the Court will consider whether, and under what circumstances, the U.S. Constitution's Due Process Clause permits U.S. courts to exercise personal jurisdiction over a parent company based on the jurisdictional contacts of its subsidiary. Each of these decisions will have major impacts on cross-border litigation in the United States.

The Alien Tort Statute – *Kiobel v. Royal Dutch Petroleum Co.*

In *Kiobel*, the Supreme Court held that the Alien Tort Statute – a one-sentence statute adopted by the inaugural U.S. Congress in 1789 that confers jurisdiction on U.S. courts for tort claims brought by aliens for violations of customary international law – does not apply to conduct that occurs in a foreign nation. The Court's ruling represents a dramatic retrenchment of federal court jurisdiction under the ATS, and is addressed to what has become the paradigm ATS claim: a claim against one or more corporations for alleged human rights violations as a result of political instability and/or violence abroad.

The plaintiffs in *Kiobel* were a group of Nigerian nationals who filed suit against various Dutch, British, and Nigerian oil companies. The plaintiffs had protested the environmental effects of oil exploration and production, and claimed that Nigerian police and military forces violently persecuted the protesters, including killing residents of the affected area and destroying their property. The plaintiffs claimed that the defendant corporations aided and abetted the security forces responsible for the atrocities, which they claimed resulted in various violations of the law of nations. The district court dismissed several of the claims, finding that those claims did not constitute violations of the law of nations as articulated by the Supreme Court in *Sosa v. Alvarez–Machain*, 542 U.S. 692 (2004). The U.S. Court of Appeals for the Second Circuit dismissed the entire case, finding that the law of nations does not recognize corporate liability.[iii]

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The Supreme Court granted *certiorari* to review the Second Circuit's ruling on corporate liability. Following argument on that question, the Court ordered the parties to brief "whether and under what circumstances the ATS allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." It affirmed the Second Circuit's dismissal of the complaint on those grounds.

The Supreme Court began by noting the canon of statutory interpretation providing that "when a statute gives no clear indication of an extraterritorial application, it has none," offering that the presumption "serves to protect against unintended clashes between our law and those of other nations which could result in international discord." The Court focused on the potential disruptions that U.S. court decisions under the ATS could have on foreign policy, due to the fact that courts, rather than the executive or legislative branches, the branches of government to which foreign affairs is entrusted by the Constitution. The Court stated:

> Indeed, the danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do. This Court in *Sosa* repeatedly stressed the need for judicial caution in considering what claims could be brought under the ATS, in light of foreign policy concerns. As the Court explained, "the potential foreign policy implications … of recognizing … causes under the ATS should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. [Citations.] These concerns, which are implicated in any case arising under the ATS, are all the more pressing when the question is whether a cause of action under the ATS reaches conduct within the territory of another sovereign.
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> These concerns are not diminished by the fact that *Sosa* limited federal courts to recognizing causes of action only for alleged violations of international law norms that are "specific, universal, and obligatory.[iv]

Having identified its concern that U.S. courts not usurp the Constitutional prerogative of Congress and the executive to conduct foreign policy, the Court then noted that "to rebut the presumption [that the ATS does not apply extraterritorially], the ATS would need to evince a 'clear indication of extraterritoriality,'"[v] and held that it did not. The Court first observed that the text of the ATS did not evidence any intention that it apply extraterritorially; while the statute confers jurisdiction on federal courts to hear claims involving violations of the law of nations, the Court noted that such violations affecting aliens can occur in the United States as well as abroad. The Court also rejected the suggestion that the statute's reference to "any civil action" necessarily evinced a Congressional intention that it apply extraterritorially, citing prior decisions holding that such "generic terms" do not rebut the presumption.[vi] Finally, the Court rejected the plaintiffs' argument that the ATS's reference to torts implicated the "transitory tort" doctrine and demonstrated that Congress intended for the ATS to apply to conduct occurring abroad.[vii]

The Court continued to note that the historical background against which the ATS was adopted failed to overcome the presumption. As it had noted in *Sosa*, at the time the ATS was enacted, there were three recognized violations of the law of nations: Violation of safe conducts, infringement of the rights of ambassadors, and piracy. After noting that the first two "have no necessary extraterritorial application"[viii] and discussing episodes that occurred just prior to the ATS's adoption demonstrating why this is so, the Court addressed piracy, a violation of international law that it found "typically occurs on the high seas,"[ix] which the Court has typically treated the same as foreign soil. The Court was unconvinced, however, that the acknowledged applicability of the ATS to piracy indicated a Congressional intent to apply the statute to violations of the law of nations occurring in the territory of a foreign sovereign, finding that

applying the statute to piracy "does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign, and therefore carries less direct foreign policy consequences."[x]

Finally, the Court noted that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms," quoting Justice Story, who stated in an 1822 decision that "[n]o nation has ever yet pretended to be the *custos morum* of the whole world," and noting that it was "implausible to suppose that the First Congress wanted their fledgling Republic – struggling to receive international recognition – to be the first."[xi]

The Court thus ruled that the ATS does not confer jurisdiction on U.S. courts for violations of international law occurring outside the United States, and affirmed the Second Circuit's ruling dismissing the complaint. All nine justices concurred in the judgment, though Justices Breyer, Ginsburg, Sotomayor, and Kagan concurred in the judgment only and offered a different rationale for their conclusion.

As noted above, the Supreme Court's decision in *Kiobel* divests federal courts of jurisdiction over what has become the paradigm ATS case: A tort claim, typically brought against a multinational corporation or foreign sovereign, alleging that acts of violence or political persecution abroad constitute a violation of customary international law. But will *Kiobel* prevent such cases from being brought in the United States, where plaintiffs have the advantage of notice pleading, jury trials, and liberal discovery? That is less clear. Indeed, the Court's restriction of jurisdiction under the ATS to violations of international law that occur in the United States will have no impact on federal courts' ability to assert jurisdiction over such claims so long as an independent basis for federal jurisdiction – such as diversity – is present. The decision will also have no impact on the ability of state courts to hear such cases. *See Skiriotes v. State of Florida*, 313 U.S. 69, 73-74 (1941) ("International law is a part of our law and as such is the law of all States of the Union."); *Peters v. McKay*, 195 Or. 412, 426, 238 P.2d 225, 231 (1951) ("In essence, the rule appears to be that international law is a part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference…"). Indeed, so long as personal jurisdiction exists over the defendant – not unlikely given that so many ATS defendants are multinational corporations operating in the United States – and subject to notions of *forum non conveniens*, it seems unlikely that the Court's decision in *Kiobel* will forcefully shut the doors of American courts to types of large tort claims that are currently brought under the ATS.

Personal Jurisdiction – *Bauman v. DaimlerChrysler Corp*.

Just five days after issuing its decision in *Kiobel*, the Supreme Court granted *certiorari* in *Bauman v. DaimlerChrysler Corp.*, another case arising under the Alien Tort Statute. *Bauman* was brought by a group of Argentine plaintiffs alleging that an Argentine subsidiary of Daimler Chrysler Corporation ("Daimler") collaborated with Argentine military and police forces to persecute labor union activists in violation of international law. Daimler moved to dismiss the case on various grounds, including lack of personal jurisdiction. The plaintiffs claimed that Daimler was subject to general personal jurisdiction in California – *i.e.*, jurisdiction based on contacts with the state that approximates a physical presence and permits any claim to be brought, regardless of whether the claim(s) arise out of the defendant's activities in the state – because one of Daimler's subsidiaries, Mercedes-Benz USA (MBUSA), had a presence and conducted extensive business in California. The District Court granted Daimler's motion to dismiss for lack of personal jurisdiction, refusing to impute MBUSA's contacts to Daimler for jurisdictional purposes. The Ninth Circuit initially affirmed, but later granted reargument and, before hearing reargument, issued a new opinion reversing the District Court.

The Court of Appeals opened by noting that there was no question whether MBUSA had sufficient contacts with California; the only question was whether MBUSA's contacts permitted the exercise of personal jurisdiction over Daimler consistently with the Due Process Clause. The Court held that under governing law, MBUSA's contacts could be imputed under either of two circumstances. First, MBUSA's contacts could be imputed to Daimler if it were Daimler's alter ego, *i.e.*, if (a) "there is such unity of interest and ownership that the separate personalities of the two entities no longer exist," and (b) "the failure to disregard their separate identities would result in fraud or injustice."[xii] The *Bauman* plaintiffs did not claim that MBUSA was an alter ego.

The Court then discussed the second method for imputing MBUSA's contacts to Daimler, the agency test. The Court described the agency test as being predicated upon a showing of the special importance of the services provided by the subsidiary on behalf of the parent, and noted that it is satisfied by "that the subsidiary functions as the parent corporation's representative in that it performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."[xiii] The Court thus formulated its inquiry as follows:

> For the agency test, we ask: Are the services provided by MBUSA sufficiently important to [Daimler] that, if MBUSA went out of business, [Daimler] would continue selling cars in this vast market either by selling them itself, or alternatively by selling them through a new representative? We answer this question in the affirmative. In addition, this test requires the plaintiffs to show an element of control, albeit not as much control as is required to satisfy the "alter ego" test. We conclude that [Daimler] has more than enough control to meet the agency test, because [Daimler] has the right to control nearly every aspect of MBUSA's business.[xiv]

The Court found that because U.S. sales of Mercedes autos are a "critical aspect" of Daimler's business, MBUSA met the special importance prong of the agency test. Likewise, it found that under the General Distributor Agreement governing the relationship between Daimler and MBUSA, Daimler had the right to control "nearly all aspects" of MBUSA's activities.[xv] The Court thus found that the agency test was satisfied.[xvi]

The Ninth Circuit's decision in *Bauman* conflicts with the Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, which have rejected the agency framework, and which have held that one corporation's jurisdictional contacts may be imputed to another only if the two corporations are shown to be alter egos of one another.[xvii] The decision also appears to conflict with the First and Eleventh Circuits, which permit the imputation of jurisdictional contacts between a parent corporation and subsidiary acting on its behalf only when the parent and subsidiary are so interrelated that they are not properly considered separate entities -- a standard more similar to the alter ego standard. [xviii]

The Supreme Court's grant of *certiorari* in *Bauman* represents the Court's latest attempt to establish clear rules concerning the ability of U.S. courts to exercise jurisdiction over non-resident defendants, and its ruling in *Bauman* will be of critical importance to non-U.S. corporations who operate in the United States through corporate affiliates. The Supreme Court clarified the contours of courts' ability to exercise personal jurisdiction over foreign corporations through two decisions rendered in 2011. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*,[xix] the Court restricted the ability of U.S. courts to assert jurisdiction over foreign corporations in product liability cases, focusing on whether the foreign corporation's contacts with the state are "sufficiently 'continuous and systematic' to justify the exercise of general jurisdiction over claims unrelated to those contacts."[xx] Specifically, the Court emphasized that the mere placement of products into the stream of interstate commerce cannot support a finding of general jurisdiction. In *J. McIntyre Machinery, Ltd. v. Nicastro*,[xxi] the Court reaffirmed that a foreign corporation's "placing goods into the stream

of commerce 'with the expectation that they will be purchased by consumers within the forum State'" may justify that state's exercise of specific jurisdiction over the corporation, but emphasized that an out-of-state corporation's "transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum."[xxii] The Court, however, found that it "is not enough that the defendant might have predicted that its goods will reach the forum State," and rejected that foreseeability as to where the defendant company's products may end up could serve as criterion for determining jurisdiction.[xxiii]

Bauman presents an opportunity for the Supreme Court to resolve the division of circuit authority on the question of imputed jurisdictional contacts and establish a clear rule that will assist non-U.S. corporations in properly understanding the potential litigation risk that the activities of their U.S. affiliates present.

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[i] 133 S.Ct. 1659 (2013).
[ii] 644 F.3d 909 (9th Cir. 2011), *cert. granted*, 80 USLW 3461, 81 USLW 3028, 81 USLW 3594, 81 USLW 3598 (U.S. Apr 22, 2013).
[iii] The other circuit courts of appeals disagreed with the Second Circuit's ruling on this point. *See Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008) ("The text of the [ATS] provides no express exception for corporations … and the law of this circuit is that this statute grants jurisdiction from complaints of torture against corporate defendants."); *Doe v. Exxon Mobil*, 654 F.3d 11, 47 (D.C. Cir. 2011) (finding nothing in the historical context of the enactment of the ATS suggesting that "corporate immunity would be inconsistent with the ATS because by [the time the ATS was adopted] corporate liability in tort was an accepted principle of tort law at the time."); *Flomo v. Firestone Natural Rubber Co*, 643 F.3d 1013, 1017 (7th Cir. 2011) (holding that corporate entities may be subject to suits arising out of the ATS); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (holding that the question of whether liability for an international law violation may extend to corporations is itself an issue properly determined by customary international law, and that the determination of whether a corporation could be held liable for a particular offense should be judged by the very same sources of customary international law that established the offense as the violation of a specific, universal, and obligatory norm of international law), *vacated and remanded by,* 2013 WL 1704704, 80 USLW 3335, 81 USLW 3028, 81 USLW 3595, 81 USLW 3598 (U.S. Apr 22, 2013) (NO. 11-649).
[iv] *Kiobel,* 133 S. Ct. at 1664-65.
[v] *Id.* at 1665.
[vi] *Id.*
[vii] *Id*. at 1665-66.
[viii] *Id*. at 1666.
[ix] *Id*. at 1667.
[x] *Id.*
[xi] *Id.* at 1668.
[xii] *Bauman*, 644 F.3d at 920.
[xiii] *Id*.
[xiv] *Id*.
[xv] *Id*. at 924.

[xvi] The Court of Appeals further found, as it was required to under Supreme Court case law, that the exercise of jurisdiction over Daimler was reasonable. The Court found that its seven-part test – which focuses on the extent of the defendant's purposeful interjection of itself into the forum state, the burden of the litigation on the defendant, the extent of any conflict that would occur with the defendant's home state's sovereignty as a result of the exercise of jurisdiction, the forum state's interest in adjudicating the suit, efficiency, the convenience and effectiveness of relief available in the U.S. court, and the existence of an alternative forum – and found the exercise of jurisdiction reasonable.

[xvii] *See, e.g., Newport News Holdings Corp. v. Virtual City Vision, Inc*., 650 F.3d 423, 433 (4th Cir. 2011); *Jackson v. Tanfoglio Giuseppe, S.R.L*., 615 F.3d 579, 586 (5th Cir. 2010); *Estate of Thomson v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362 (6th Cir. 2008); *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp*., 230 F.3d 934 (7th Cir. 2000); *Viasystems, Inc. v. EBM-Papst St. Georgen GmbH & Co., KG*, 646 F.3d 589, 596 (8th Cir. 2011).

[xviii] *See Miller v. Honda Motor Co.*, 779 F.2d 769, 773 (1st Cir. 1985); *Consolidated Development Corp. v. Sherritt, Inc*., 216 F.3d 1286 (11th Cir. 2000).The Ninth Circuit's analysis appears to comport with that of the Second Circuit. *See Wiwa v. Royal Dutch Petroleum Co*., 226 F.3d 88, 95 (2d Cir. 2000) (agency relationship may be established for jurisdictional purposes whenever the subsidiary is performing services on behalf of the parent corporation that the parent would perform through some other means if the subsidiary were no longer available).

[xix] 131 S.Ct. 2846 (2011)

[xx] *Id*. at 2854.

[xxi] 131 S.Ct. 2780 (2011).

[xxii] *Id*. at 2788.

[xxiii] *Id*. at 2788.